

23-055

NATHAN G. KNIGHT, Jr  
Vice President  
Regional Director, Anti-Piracy  
Europe, Middle East & Africa

EUROPEAN OFFICE  
Avenue de Tervueren, 270-272  
B-1150 Brussels, Belgium  
Tel: (32-2) 778 27 11  
Fax: (32-2) 778 27 50  
E-mail: nknight@mpaa.org

## FAX MESSAGE

TO: Ric Hirsch  
Mark Litvack  
DATE: 5 January, 2000

FAX#: (1-818) 382 1797  
STRICTLY CONFIDENTIAL

CC: Dara MacGreevy OK 5/1

FROM: Nathan Knight

RE: DVD DeCSS Hack

NUMBER OF PAGES INCLUDING COVER: 3

Dear Ric and Mark:

I found the article that Mark circulated entitled "Netizens Unite against Big Business over DVDs" very interesting. It prompted the following thoughts that I would like to share with you. Many of these thoughts occurred to me previously and, undoubtedly, to you as well. Putting them down however may hopefully add focus to our internal deliberations. I would like to suggest that the four of us and whomever else you deem appropriate speak soonest to brainstorm.

1. The article concludes that we "Big Business" have lost the war to contain DeCSS. I think this is correct in as far as CSS is concerned. The interesting point though is that it considers - and this seems to be the case for all the hacker activists that commented - that our objective is to quash DeCSS. In my view, our objective should be much broader, and our efforts to limit DeCSS, while important, should be only a means to our real objective of strengthening copyright on the Internet. To achieve this objective we should use DeCSS as a case study: (1) to alter (strengthen) our negotiating position vis à vis hardware manufacturers on ongoing copy protection technology discussions, and (2) to demonstrate the gaps and weaknesses in current legislation in a renewed attempt to strengthen copyright. It is obviously very important to fight the good fight against DeCSS. If we eventually win, then that's great as copyright will have been

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We might wish to consider defining and articulating such objectives to the highest levels of our member companies in order to ensure their support (financial and practical) in the DeCSS fight. A failure to fight a good fight may not only see us clobbered on the DeCSS front, but also, and perhaps more importantly, lead to further setbacks to copyright protection in the Internet world. Our companies may not have the stomach for this approach but they should understand it and factor it in with their commercial priorities.

2. Related to the above, I continue to advocate taking a tough stand against Real Networks, Matsushita, and, to the extent that it is within our control, Johanssen and Fawcus. Call me a Hawk but for years I have heard Jack say "if you cannot control what you own, you don't own anything". I commented to Mark yesterday after reading Lauri Donahue's description of the DVD CCA hearing proceedings that it does not appear Weil Gotshal is interested to wage war. The MPA did not choose this forum and fight, but there is no escaping the fact that it will influence what we wish to do against DeCSS elsewhere. For this reason, and apart from leaning on Matsushita to fire up Weil Gotshal, we may want to consider getting Proskauer Rose (whom I am impressed with) involved in the case, whether indirectly or directly. Also, do we want DVD CCA to be seen as representing the "entertainment industry" on this issue? We may not win the case, but we will have better control over the debate to ensure that the issues are focused properly for our real objectives, subsequent legislative efforts and negotiations with the hardware folks.
3. If we define our objective as suggested, we need to begin building our case now. We should be cataloguing all the defensive (and offensive) steps the hacker activists are taking, e.g. 'The Great International DVD Source Code Distribution Contest'. I suspect their actions will demonstrate the weaknesses in Internet governance and a lack of concern for the rule of law that we can turn to our political advantage. This information could be invaluable later when we seek strengthened legislation. Let's get our lobbyists focused on how we can use these developments to our advantage.
4. Matsushita has concluded that it cannot claim copyright infringement in the hack and consequently premises its case on a loss of trade secrets. Understanding that Matsushita marketing folks really do not want to fight the DeCSS fight, are we satisfied with this conclusion? Have we had one of our lawyers look at it? In the UK, the originality threshold for copyright infringement is quite low. An appropriate analysis under UK law might strengthen our hand both in our public court actions and privately with Matsushita.
5. I do not claim to be technically gifted in Internet ways, but the whole discussion seems to have taken on a LINUX focus. Didn't Fawcus uplink the DeCSS in a Microsoft utility? Was this act necessary for LINUX development? It is the LINUX Community that is taking the lead against us. Strategically, we should attempt to separate them out of the equation. For example, why don't we state publicly that we are not addressing LINUX issues and that we do not believe the hack was LINUX inspired?
6. The raid in Norway may help us refocus the discussion in the TRO hearing. I think we should consider going on the PR offensive to explain our case. Our "no comment" PR approach to date is leaving the field to the hacker activists, and in my view is contributing to their present momentum in the press.

7. I continue to believe that the MPA should not hide behind the prosecutors. It is our job to protect the IP of the studios and we should be seen doing so. The EU strategy of "quiet diplomacy" is misplaced here.

Lastly, there are some important developments in the UK that Dara and I would like to discuss with you tonight. I think the next days in Europe could, if we so desire, act to alter the dynamic of this debate.

Kind regards

A handwritten signature in black ink, appearing to be 'A. M.' or similar, written over the 'Kind regards' text.

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